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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

**CV 12 80107 MISC.**

REALTIME DATA, LLC d/b/a IXO.,

*Plaintiff,*

vs.

METROPCS TEXAS, LLC, *et al.*

*Defendants.*

MISC No.:

[Plaintiff Realtime Data files this motion pursuant to subpoenas for deposition and documents served upon third-party Openwave Systems]

**REALTIME DATA LLC'S MOTION TO COMPEL DOCUMENT PRODUCTION AND TESTIMONY FROM OPENWAVE SYSTEMS, INC.**

**(Case No. 6:10-cv-00493-LED (E.D. Tex.))**

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1 TO THE HONORABLE UNITED STATES DISTRICT COURT:

2 Realtime Data, LLC d/b/a IXO ("Realtime") files this Motion to Compel Production of  
3 Documents and Testimony from Openwave System, Inc. ("Openwave") and would respectfully  
4 show the Court as follows:

### 5 **Jurisdiction**

6 This Court has jurisdiction over this Motion to Compel under 28 U.S.C. § 1338(a)  
7 because the underlying action arises under the Patent Laws of the United States, Title 35 of the  
8 United States Code.

### 9 **I. Introduction and Background**

10 On September 23, 2010, Realtime filed a patent infringement action, styled *Realtime*  
11 *Data, LLC d/b/a IXO vs. MetroPCS Texas, LLC et al.*, Case No. 6:10-cv-00493-LED, in the  
12 United States District Court for the Eastern District of Texas, Tyler Division (the "Lawsuit"), for  
13 infringement of eight (8) separate U.S. Patents owned by Realtime.<sup>1</sup> The patents-in-suit are  
14 directed to systems and methods for data compression and accelerated data storage and retrieval.  
15 In the Lawsuit, Realtime asserts that certain wireless communication companies, namely Sprint  
16 Nextel Corporation and its affiliates (collectively "Sprint"), AT&T, Verizon, MetroPCS, Cricket,  
17 and T-Mobile (the "Defendants"), infringe Realtime's patents by using certain data compression  
18 and data acceleration technology in their data communication networks for downlink data  
19 communications.

20 The close of fact discovery in the Lawsuit is fast approaching on June 15, 2012. Heptig  
21 Decl., Ex. 2 (Docket Control Order at 3). The Court in the Eastern District of Texas entered a  
22 Discovery Order providing that "source code will not be subject to discovery in this case until an  
23 appropriate protective order is entered by the Court setting forth specific procedures for source  
24

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25 <sup>1</sup>Realtime's current operative pleading is its Second Amended Complaint for Patent Infringement  
26 filed on October 18, 2011. See Declaration of J. Pat Heptig in Support of Realtime Data's  
27 Motion to Compel, Exhibit 1 thereto, filed concurrently herewith (hereafter "Heptig Decl.").  
28 During the course of the case, Realtime has narrowed the case by removing two patents and  
removing certain claims within the 6 remaining asserted patents.

1 code production to guard against any inappropriate disclosure of source code material, whether  
2 intentional or unintentional.” On June 6, 2011, the Court entered a Stipulated Protective Order  
3 providing extensive and detailed guidelines and procedures for the protection of confidential  
4 information and computer source code. *Id.*, Ex. 3 (Stipulated Protective Order at p. 14)

5 In the course of discovery in the Lawsuit, Realtime learned that various data compression  
6 products produced by Openwave are or have been utilized in the accused Sprint wireless data  
7 network. Accordingly, on January 4, 2012, Realtime served a Subpoena Duces Tecum on  
8 Openwave requesting the production of documents from Openwave regarding the features and  
9 functionality of the Openwave data compression products used by Sprint in the accused data  
10 network. Heptig Decl., Ex. 4 (document subpoena). Realtime also delivered to Openwave a  
11 copy of the Stipulated Protective Order with the document subpoena. *Id.*

12 After Realtime agreed to an extension of time to respond, Openwave served its objections  
13 to Document Subpoena on January 27, 2012. *Id.*, Ex. 5 (Openwave objections). Since that time,  
14 Realtime has attempted to respond to Openwave’s objections and to resolve any confidentiality  
15 issues so that Openwave could and would produce the requested documents. Realtime has had  
16 numerous verbal and written communications with Openwave in order to attempt to reach a  
17 resolution. Realtime has explained its document requests, refined the issues, and narrowed the  
18 scope of its requests in a good faith attempt to reach agreement on these issues. *See* Heptig Decl.,  
19 ¶¶ 8-9 and Exhibits 6-9 thereto. But those efforts were not successful, thereby necessitating this  
20 motion.

21 To date, Openwave has produced a total of only six (6) documents in response to the  
22 subpoena, totaling about 300 pages. However, these few documents are “customer level”  
23 documents that provide only high level descriptions of the product functionality. Two of the  
24 documents are product “installation” and “administration” documents intended for Openwave  
25 customers. One is simply a “white paper” that describes the general functionality of one  
26 Openwave data compression product. These few documents do not provide descriptions of all of  
27 the Openwave data compression products at issue here. Nor do they provide the level of  
28 technical detail necessary to show how the Openwave data compression products actually

1 perform the data compression functions, such as how it analyses the data received by the system,  
 2 what compression algorithms are utilized for each type of input data, how the system chooses the  
 3 compression parameters for the compression algorithms, how the system adapts those parameters  
 4 depending upon network and device conditions, etc.. Moreover, the handful of documents do not  
 5 show the technical operation details of the multiple Openwave data compression products (and  
 6 sub-versions of those products) utilized by Sprint in the accused data network. Openwave has  
 7 refused to produce any further documents in response to the subpoena.

8 In addition serving a document subpoena, on March 5, 2012, Realtime served a  
 9 deposition subpoena upon Openwave, seeking testimony on topics paralleling the topics covered  
 10 by the document requests in the document subpoena. Heptig Decl., Ex. 10 (the "Deposition  
 11 Subpoena"). On March 19, 2012, Openwave served its objections to the Deposition Subpoena,  
 12 which essentially mirror Openwave's objections to the Document Subpoena. *Id.* Ex. 11  
 13 (Openwave objections to deposition subpoena).

14 As shown below, Openwave's objections to Realtime's document requests and  
 15 corresponding deposition are not valid. Openwave's objections should be overruled, and this  
 16 Court should order Openwave to produce all of the requested documents and a witness to testify  
 17 about the documents and other topics set forth in the Deposition Subpoena.

## 18 **II. Argument and Authorities**

### 19 **A. The Requested Documents and Testimony Are Discoverable**

20 Rule 45 of the Federal Rules of Civil Procedure governs discovery of nonparties by  
 21 subpoena. The scope of discovery through a subpoena is the same as that applicable to Rules  
 22 26(b) and 34. *Exxon Shipping Co. v. U.S. Dept. of Interior*, 34 F.3d 774, 779 (9th Cir. 1994).

23 Rule 26(b) permits discovery of any nonprivileged matter that is "relevant to any party's  
 24 claim or defense" where "relevant information need not be admissible at the trial if the discovery  
 25 appears reasonably calculated to lead to the discovery of admissible evidence." Relevancy, for  
 26 the purposes of discovery, is defined broadly. *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir.  
 27 1993). Further, the Federal Circuit has encouraged courts to err on the side of disclosure. "A  
 28 district court whose only connection with a case is supervision of discovery ancillary to an action

1 in another district should be especially hesitant to pass judgment on what constitutes relevant  
 2 evidence thereunder. Where relevance is in doubt...the court should be permissive.” *Truswal*  
 3 *Systems Corp. v. Hydro-Air Engineering, Inc.*, 813 F.2d 1207, 1211-12 (Fed. Cir. 1987).

4 All of the requested documents and witness testimony are relevant to the issues in the  
 5 Lawsuit. The requested documents deal directly with the various data compression products from  
 6 Openwave utilized in the accused data network operated by Sprint (and possibly other  
 7 Defendants in the Lawsuit).<sup>2</sup> These are the very products and services which, when utilized in  
 8 the Sprint data network for downlink data communications, are alleged to infringe on Realtime’s  
 9 patents. The requested deposition testimony parallels the document requests and is directly  
 10 relevant to the Openwave data compression product utilized by Sprint in its accused data  
 11 network. The documents and testimony are, therefore, discoverable and should be produced by  
 12 Openwave.

13 **A. The Withheld Documents and Testimony Are Not Available From Any Other**  
 14 **Source**

15 Rule 45(c)(3)(B) and (C) of the Federal Rules of Civil Procedure provide the Court may  
 16 allow discovery of confidential information if there exists “...a substantial need for the testimony  
 17 or material that cannot be otherwise met without undue hardship...” Disclosure of protectable  
 18 information is not *per se* unreasonable when appropriate protective measures are imposed.  
 19 *Gonzales v. Google*, 234 F.R.D. 674, 686 (N.D.Cal. 2006).

20 A substantial need exists for production of the withheld documents and the deposition  
 21 testimony. In the scope of discovery in the Lawsuit, Realtime has learned that various data  
 22 compression products from Openwave are being utilized or have been utilized in the accused  
 23 data network operated by Sprint. Realtime has requested relevant documents from Sprint (and  
 24 the other Defendants) in the Lawsuit. Sprint produced documents describing the operations of  
 25 the Openwave data compression products.<sup>3</sup> The Sprint documents, however, provide only high-

26  
 27 <sup>2</sup> Openwave’s counsel has represented that Sprint is the only defendant in the Lawsuit that has  
 licensed any Openwave data compression products. *See* Heptig Decl., ¶ 12.

28 <sup>3</sup> Sprint asserts that it has produced all of its documents in its possession relating to the operation  
 of the Openwave data compression products in the accused Sprint data network. *See* Heptig



level generalizations of only some of the relevant features of the Openwave products. The Sprint documents do not show the technical details of how the Openwave products actually perform the various data compression-related features and functions at issue in the underlying patent infringement action. As a result, Openwave is the only party that has all of the requested relevant documents and information (e.g., Openwave's product design documents, system functional architecture documents, data flow diagrams, computer source code, operational manuals and procedures). Therefore, Openwave is the party who is in the best position to produce the necessary documents and testimony with the least burden to all concerned.

If Realtime is prevented from obtaining this discovery, it will be prevented from accessing facts necessary to support its infringement claims at trial and the documents will be unavailable as proof at trial. While Realtime understands Openwave's reluctance to produce confidential information, reluctance alone is insufficient to warrant the refusal to produce the requested documents. A protective order is an appropriate protective measure, when the discovery sought is from a third-party to the main litigation. *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1325 (Fed. Cir. 1990). The Stipulated Protective Order entered by the Court in the Eastern District of Texas in the underlying action adequately protects Openwave's confidential and proprietary information. Therefore, the documents and testimony requested by Realtime should be produced.

Openwave has lodged numerous objections to Realtime's production requests and the deposition topics. As shown below, those objections are without merit and should be overruled.

### **III. Openwave's Objections to the Document Subpoena Should be Overruled**

#### **A. Openwave's General Objections Should be Overruled**

Openwave has set forth numerous "General Objections" to Realtime's document requests, which are addressed below.

**General Objection 1:** Openwave objects to the subpoena "to the extent that it seeks documents that are not reasonably calculated to lead to admissible evidence in the [Lawsuit]"

Decl., ¶ 13. No other Defendant in the Litigation has identified any use of Openwave data compression products in their respective accused data networks. *Id.* at ¶14.

1 Openwave further asserts that Realtime has refused to provide Openwave with copies of  
2 Realtime's infringement contentions.

3 The objection is without merit. The objection is so global that it is meaningless. No  
4 particular document request is identified, nor is any reason specified that any request is not  
5 relevant or material. Openwaves' professed ignorance of the underlying infringement allegations  
6 is simply false. Realtime has provided Openwave with ample information regarding the  
7 requested discovery and the underlying patent infringement claims in the Lawsuit, including  
8 identifying the asserted patents and the asserted claims in each patent, and providing claim  
9 construction rulings by the Eastern District of Texas court interpreting the claim terms in the  
10 asserted patents. And finally, on April 16<sup>th</sup>, after Sprint consented to the disclosure of its  
11 confidential information, Realtime provided Openwave's counsel with a copy of Realtime's  
12 initial infringement contentions from the underlying action as they pertain to the Openwave data  
13 compression products in the accused Sprint data network. *See* Heptig Decl., ¶15.

14 **General Objection 2:** Openwave objects to the subpoena "to the extent that it seeks  
15 documents that are publicly available or in the possession, custody or control of defendants in the  
16 [Lawsuit] or Realtime."

17 This objection is also without merit. It is so global and general as to be meaningless. No  
18 particular request is identified, and no documents are specified. Further, merely because a  
19 document may be publicly available or in the possession of one of the parties to the Lawsuit does  
20 not make it exempt from discovery.

21 **General Objection 3:** Openwave objects to the subpoena to the extent that it seeks  
22 privileged documents.

23 Under Rule 26 of the Federal Rules of Civil Procedure, this is not an appropriate method  
24 by which to withhold alleged privileged material. Openwave has not identified any allegedly  
25 privileged documents, much less the basis for withholding any alleged privileged documents.

26 **General Objection 4:** Openwave objects to the subpoena "to the extent that it purports to  
27 impose on Openwave burdens and obligations that exceed those required by the Federal Rules of  
28 Civil Procedure . . . ."

1 The objection is without merit. It specifies no such rules and no such excess “burdens and  
2 obligations” allegedly imposed on Openwave.

3 **General Objection 5:** Openwave objects to the subpoena because the term  
4 “Compression Server” is alleged to be vague, ambiguous and unintelligible and calls for a legal  
5 conclusion regarding the scope of the claims in the Lawsuit.

6 The objection is without merit and should be overruled. The term “Compression Server”  
7 is explicitly defined in paragraph I.4 of Exhibit A to the Document Subpoenas as:

8 “COMPRESSION SERVER includes all hardware and/or software products developed or  
9 created by you that provide or are intended to provide data compression, media  
10 optimization, image optimization, markup optimization, bandwidth optimization,  
11 bandwidth shaping, bandwidth allocation, transcoding, “transrating”, reduction and/or  
12 acceleration for data transmissions in a data network, including but not limited to,  
13 products and services using all versions of the Openwave “Integra” products, the  
14 Openwave “Media Optimizer” products, and the Openwave “Web Optimizer” products,  
15 and other similar data compression, optimization, reduction and/or acceleration  
16 technologies developed, marketed or sold by you.” Heptig Decl., Ex. 4 (subpoena Ex.  
17 “A” at p.1)

18 This definition is clear, concise, and easily understood. It even specifically identifies several of  
19 the Openwave data compression products at issue here. Namely, the Openwave “Integra,”  
20 Openwave “Web Optimizer,” and Openwave “Media Optimizer” data compression products. In  
21 addition, in correspondence with Openwave’s counsel, Realtime further narrowed and specified  
22 the Openwave data compression products at issue: “The documents produced by Sprint in the  
23 underlying litigation show that at least the following Openwave products are or have been  
24 utilized by Sprint to perform data compression and/or data optimization in the Sprint data  
25 network: Openwave Integra, Openwave Integra with Value Added Services (VAS), Openwave  
26 Media Optimizer, Openwave Web Optimizer, Openwave MAG (including the MAG5, MAG 6,  
27 and MAG 6.4 product versions), Openwave ‘OpenWeb’ and ‘OpenWeb’ ASP.” See Heptig  
28 Decl., Ex. 7 (February 14, 2012 letter to Openwave counsel). The definition of “Compression

1 Server” in the Deposition Subpoena identifies an additional Openwave data compression  
 2 product, the “MAG” product. *Id.*, Ex. 10 (subpoena exhibit “B” at p. 2). In all events, the  
 3 definition is clear and easily understood. Openwave’s objections are without merit and should  
 4 be overruled.<sup>4</sup>

5 **General Objection 6:** Openwave objects to the subpoena “to the extent that it requires  
 6 disclosure of trade secret, proprietary or other confidential information or competitively sensitive  
 7 information.” Openwave further objects to the subpoena to the extent that it seeks disclosure of  
 8 information that it is contractually prevented from disclosing.

9 The objection is without merit and should be overruled. The objection specifies no  
 10 particular confidential information that has been requested and no third-party contracts that  
 11 might apply here. Regardless, the Stipulated Protective Order provides confidentiality  
 12 protections for any such Openwave and third-party confidential information.

13  
 14 **B. Openwave’s Objections to Realtime’s “Definitions and Instructions” Are Without Merit**

15 Openwave asserts numerous objections to the “definitions and instructions” contained in  
 16 Realtime’s Document Subpoena. Realtime below responds to each in order.

17 **Objection 1:** Openwave “generally objects” to Realtime’s instructions to the extent they  
 18 purport to exceed the requirements of Rule 45 of the Federal Rules of Civil Procedure. The  
 19 objection is without merit. It sets forth no instruction(s) to which the objection might apply.

20 **Objection 2:** Openwave objects to the definition of “Openwave” to the extent it includes  
 21 persons acting on behalf of Openwave without having authority to do so. The objection should  
 22 be overruled. If Openwave has knowledge of any such actors, it should be required to produce  
 23 any responsive documents which relate to such persons.

24  
 25  
 26 <sup>4</sup> Openwave makes the identical objection to the term “Compression Server” to many of  
 27 Realtime’s discovery requests. Realtime’s response to this particular objection is the same for  
 28 each such objection. To avoid repetition of Realtime’s response, Realtime hereby incorporates by  
 reference its response to Openwave’s objections to the term “Compression Server” in each  
 instance.

**Objection 3:** Openwave objects to Realtime's definition of "Communications" as overly broad and "unduly burdensome to the extent that it seeks to encompass transmittals of information that have not been reduced to writing." The definition is not overbroad. It is clear and concise. An example of a "transmittal not reduced to writing" is an electronic communication, which is discoverable and covered by the definition.

**Objection 4:** Openwave objects to Realtime's definition of "refer," "relate," or "concern" because the definition is alleged to be "overly broad and unduly burdensome to the extent that it is broader than the scope of relevant discovery defined in . . . Rule 26(b)." The objection is without merit and should be overruled. The definition is not overly broad. It is clear and concise. Openwave makes no mention of how the definition might exceed the parameters of Rule 26(b).

**Objection 5:** Openwave objects to Realtime's definition of "source code" because it is "overly broad and unduly burdensome to the extent it seeks any files that are not permanently saved or stored by Openwave or that are not reasonably accessible because of undue burden or cost." The objection is without merit. The definition again is clear and concise. Further, if the source code is not saved or stored, it could not be produced in any event. Openwave fails to state that any source code requested is not reasonably accessible or that there is any undue burden or cost involved in accessing any source code. Openwave cannot rely on a mere conclusory statement that there is an undue burden or cost. It must state what that "undue" burden or cost is and provide supporting facts. It has failed to do so here.

#### **IV. Openwave's Objections to Specific Document Requests Should be Overruled**

**A. Request for Production No. 1:** "Documents sufficient to show the features and functionality of each Compression Server product or service provided to or used by any Defendant."

Openwave objects to this request on many grounds. First, Openwave incorporates all of its General Objections regardless of their applicability to this specific request. Realtime

1 incorporates its responses to those objections set forth above.<sup>5</sup> Openwave then lists other  
2 objections to the request, as follows.

3 1. Openwave objects that Realtime has received or can obtain the requested  
4 documents from Sprint or the other Defendants in the Lawsuit. As discussed above, Sprint has  
5 produced the documents in its possession in the underlying action relating to the Openwave  
6 products. Those documents do not disclose the technical details of how the Openwave products  
7 operate. Therefore, it is not possible for Realtime to obtain the necessary documents from Sprint  
8 or other Defendants in the Lawsuit. Moreover, Openwave does not and cannot know what  
9 documents Realtime may have received from others. And even if it did, that is not a valid reason  
10 for Openwave to refuse to produce relevant documents. The documents sought are Openwave's  
11 documents. Openwave is the only party who can know all of the documents related to its  
12 products. Openwave is the only party that can prove up its own documents and the information  
13 disclosed therein. Even if Sprint produced some of the requested documents (such as operation  
14 manuals), Realtime cannot know if all documents relevant to Openwave's products were  
15 provided to or produced by Sprint. The only source for all of the requested documents is  
16 Openwave.<sup>6</sup>

17 2. Openwave next objects that the request is overly broad and unduly burdensome.  
18 The request is neither. Openwave has only set forth its conclusions about the requested  
19 documents. It has failed to state even one fact or reason to support its conclusions. Regardless,  
20 Realtime has attempted in good faith to narrow the requests to reduce any alleged burden on  
21 Openwave. *See* Heptig Decl., ¶¶ 8-9, Exs. 6-9 (letters to Openwave providing detail and  
22

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23 <sup>5</sup> Openwave incorporates its general objections in response to every production request.  
24 Realtime's response to that particular objection is the same for each such objection. To limit the  
25 continued repetition of Realtime's response to that objection, Realtime hereby incorporates by  
reference its responses to Openwave's general objections for each instance.

26 <sup>6</sup> Openwave makes the same objection to many of Realtime's requests that the requested  
27 documents can be obtained from other sources. Realtime's response to that particular objection  
28 is the same for each such objection. To avoid repetition, Realtime hereby incorporates by  
reference the foregoing response to Openwave's objection that the requested documents can be  
obtained from other sources for each instance.



1 narrowing scope of document requests). Openwave has argued that the request is overbroad  
2 because it encompasses the Openwave “Media Optimizer” data compression product – a product  
3 which Openwave’s counsel claims has not been tested or implemented in the accused Sprint  
4 network. Realtime requested some form of evidence to establish Openwave’s counsel’s claim of  
5 “non-use,” but none has been provided to date. In contradiction to Openwave’s counsel claims,  
6 documents produced by Sprint indicate that the Openwave “Media Optimizer” product is or was  
7 utilized by Sprint. There is a factual dispute on this issue and Realtime is entitled to discovery to  
8 ascertain whether the product has been used by Sprint or not. If the evidence shows that the  
9 product has not been used or tested by Sprint, then Realtime has already agreed that it does not  
10 need technical documents for that particular product. Openwave’s objection regarding the  
11 “Media Optimizer” product does not apply to the other Openwave data compression products  
12 used by Sprint, including the Openwave “Integra,” “Web Optimizer,” “OpenWeb,” and “MAG”  
13 products. Moreover, documents responsive to Request Nos. 6-9 relating to cost analyses, data  
14 traffic reduction analyses, or “return-on-investment” analyses would continue to be relevant and  
15 material because such documents may contain information regarding Sprints internal costs  
16 structures and Sprint’s alleged decision to implement or not implement the Openwave “Media  
17 Optimizer” product. Such information is relevant and material to the damages in the underlying  
18 litigation and is reasonably calculated to lead to the discovery of admissible evidence.

19 3. Openwave objects to the request to the extent it seeks Openwave’s proprietary  
20 and confidential information and/or proprietary and confidential information of other parties that  
21 Openwave is contractually bound not to disclose. It is difficult to imagine any patent  
22 infringement suit that does not involve the disclosure of confidential information. That is  
23 precisely why the District Court in the Eastern District of Texas issued its Stipulated Protective  
24 Order in the underlying action. That order adequately protects any Openwave confidential  
25 information that will be disclosed.<sup>7</sup>

26  
27 <sup>7</sup> Openwave makes the same “confidentiality” objection to many of the document requests.  
28 Realtime’s response to this objection is the same for each such objection. To avoid repetition,  
Realtime hereby incorporates by reference the foregoing response to Openwave’s  
“confidentiality objection in each instance.

1 Notably, Openwave does not assert that requested documents are not relevant or material  
 2 to the issues in the Lawsuit. Indeed, it is clear that the requested documents are of great  
 3 relevance and materiality to those issues. *See* Heptig Decl., ¶¶ 8-9, Exs. 7 & 9 (February 14 and  
 4 April 10, 2012 letters to Openwave counsel detailing relevance and materiality of requested  
 5 documents). Openwave's objections to this document request should be overruled, and  
 6 Openwave should be ordered to produce the requested documents at the earliest possible date.

7 **B. Request for Production No. 2:** "All installation, operation, administration and/or  
 8 user manuals for each Compression Server product or service provided to or used by any  
 9 Defendant."

10 1. Openwave objects that the request is overly broad and unduly burdensome. The  
 11 request is neither. Openwave has only set forth its conclusions about the requested documents. It  
 12 has failed to state even one fact or reason to support its conclusions. To the extent the objection  
 13 is premised upon the request for documents relating to the Openwave "Media Optimizer"  
 14 product, that issue has been discussed above in connection with Request No. 1. *See* Section  
 15 IV.A.2, *supra*.

16 Notably, Openwave does not assert that the requested documents are not relevant or  
 17 material to the issues in the Lawsuit. Indeed, the "installation, operation, administration, and user  
 18 manuals" for each Openwave data compression product utilized by Sprint in the accused data  
 19 network is highly relevant. Those documents provide information as to how Sprint is  
 20 implementing and operating the Openwave products in the accused network. While this  
 21 document category has some overlap to Request No. 1, Realtime provided Openwave with a list  
 22 of customer "user" manuals apparently missing from Sprint's document production. *See* Heptig  
 23 Decl., Ex. 9 (April 10, 2012 letter at p. 7-8 setting out list of missing user manuals). Openwave's  
 24 objections should be overruled, and Openwave should be ordered to produce the requested  
 25 documents at the earliest possible date.  
 26  
 27  
 28



1           **C. Request for Production No. 3:** “Source Code for each Compression Server  
2 product or service provided to or used by any Defendant.”

3           1. Openwave objects that the request is overly broad and unduly burdensome. The  
4 request is neither. The request is clear and limited to source code for the Openwave data  
5 compression products provided to Sprint or any other Defendant in the Lawsuit. During  
6 discussions between counsel for the parties, Openwave has asserted that its products incorporate  
7 certain “open source” computer software and, therefore, Openwave should not have to produce  
8 any source code. To the contrary, regardless of whether Openwave obtained some software code  
9 from an “open source” provider, Openwave had to incorporate any such “open source” code into  
10 it’s the existing source code for its final product. How that “open source” code was modified  
11 and implemented in the Openwave product is relevant and material to see exactly what alleged  
12 “open source” code was utilized and how it was utilized in the overall product software that  
13 constitutes the Openwave products. Simply pointing to a third-party “open source” provider does  
14 not establish (and is not evidence of) what particular function the software source code performs  
15 in the Openwave products in issue here. That can only be determined from Openwave’s source  
16 code.

17           2. Openwave objects to the request to the extent it seeks Openwave’s proprietary  
18 and confidential information and/or proprietary and confidential information of other parties that  
19 Openwave is contractually bound not to disclose. Again, this is the same objection Openwave  
20 asserted against “Request for Production No. 1.” For the same reasons set forth above,  
21 Openwave’s objection based on confidentiality is without merit. *See* Section IV.A.3 *supra*.  
22 Indeed, this objection is even more without foundation with respect to any alleged “open source”  
23 code utilized in Openwave’s products. Furthermore, on several occasions, Realtime proffered a  
24 “source code production protocol” to Openwave providing additional protections for the review  
25 and production of computer source code. But, Openwave’s counsel ignored the proposal. *See*  
26 Heptig Decl., Exs. 7 & 9 (February 14<sup>th</sup> and April 10<sup>th</sup> letters to Openwave counsel attaching  
27 draft source code production protocol and requesting comments).  
28

1 Openwave does not assert that the requested source code documents are not relevant or  
2 material to the issues in the Lawsuit. Indeed, it is clear that the requested product source code is  
3 highly relevant and material to Realtime's patent infringement claims against Sprint.  
4 Openwave's objections to the document request should be overruled, and Openwave should be  
5 ordered to produce the requested documents at the earliest possible date.

6 **D. Request for Production No. 4:** "All Documents sufficient to show the current  
7 and historical sales (from 2004 to the present) of each Compression Server product and service  
8 provided to or used by any Defendant."

9 1. Openwave objects that Realtime has received or can obtain the requested  
10 documents from Sprint or other Defendants in the Lawsuit. This is the same objection Openwave  
11 asserted with regard to "Request for Production No. 1." For the same reasons set forth above,  
12 Openwave's objection is without merit. *See* Section IV.A.1 *supra*. In addition, Realtime agreed  
13 to narrow this request to production of sales agreements and contracts between Openwave and  
14 Sprint (or any other Defendant) that were not produced in the underlying action. Realtime is still  
15 in the process of obtaining production of all of sales agreements and contracts from Sprint in the  
16 Lawsuit. To the extent Sprint does not have the agreements or contracts, Openwave should be  
17 required to produce them.

18 2. Openwave next objects that the request is overly broad and unduly burdensome.  
19 The request is neither. Realtime has already agreed to narrow this request to production of sales  
20 agreements and contracts that are not produced by Sprint in the underlying Lawsuit. *See* Heptig  
21 Decl., Ex. 7 (February 14, 2012 letter to Openwave counsel at p. 3).

22 Openwave has not objected that the requested documents are not relevant or material to  
23 the issues in the Lawsuit. The sales records are relevant to the issue of damages in the underlying  
24 action because the amount of money Sprint paid for the Openwave data compression products  
25 impacts the costs savings Sprint has achieved from using the Openwave products in the Sprint  
26 network. Openwave's objections are without merit and should be overruled. Openwave should  
27 be required to produce the requested documents at the earliest possible date, if not otherwise  
28 produced by Sprint.

1           **E. Request for Production No. 5:** “All Communications between You and any  
2 Defendant relating to the operation, design, features, functionality and/or installation of each  
3 Compression Server product or service.”

4           Openwave objects that the request is overly broad and unduly burdensome and because it  
5 seeks documents that are not reasonably calculated to lead to admissible evidence. The request is  
6 neither overly broad nor unduly burdensome. Realtime previously agreed to limit this request to  
7 communications with Sprint relating to customizations of the Openwave products for use in the  
8 Sprint data network. *See* Heptig Decl., Ex. 7 (February 14<sup>th</sup> letter to Openwave counsel at p. 3).  
9 The requested documents are relevant to the underlying patent infringement claims because the  
10 documents will evidence any customizations to the Openwave data compression products for  
11 Sprint’s data network and the reasons why Sprint wanted such changes. Openwave’s objections  
12 to this request are without merit and should be overruled.

13           **F. Request for Production No. 6:** “All Documents relating to the value, benefits or  
14 advantages of each Compression Server product and service provided to or used by any  
15 Defendant.”

16           Openwave objects that the phrase “value, benefits or advantages” is vague, ambiguous,  
17 inherently subjective and not reasonably calculated to lead to the discovery of admissible  
18 evidence. The phrase is simple, straightforward English. Openwave certainly describes its  
19 products and services to its customers and potential customers as having value, benefits, and  
20 advantages. The requested documents are extremely relevant and material to the issues in the  
21 Lawsuit, including damages and patent validity. The requested documents contain information  
22 about the Openwave data compression products utilized in the accused Sprint network, about the  
23 unique and valuable capabilities of those products, and about the advantages and benefits Sprint  
24 obtains from using the Openwave products in the Sprint network. All of which could be used as  
25 evidence in the Lawsuit or lead to the discovery of such admissible evidence. Openwave’s  
26 objections to the document request should be overruled, and Openwave should be ordered to  
27 produce the requested documents at the earliest possible date.  
28

1           **G. Request for Production No. 7:** “All Documents relating to any return-on-  
 2 investment (ROI) analysis for any of your Compression Server products or services that you  
 3 have performed, participated in, or received.”

4           Openwave objects that the request is overly broad and unduly burdensome and that it is  
 5 not reasonably calculated to lead to the discovery of admissible evidence. The request is neither  
 6 overly broad nor unduly burdensome. It is clear and precise. The requested documents are  
 7 extremely relevant and material to the issue of damages in the Lawsuit. The requested documents  
 8 show the cost savings and financial benefits flowing to Sprint from using the Openwave data  
 9 compression products in the accused Sprint data network. Indeed, Openwave’s company website  
 10 offers a “ROI” calculator for interested customers to use to get a “ball park” figure for the type  
 11 and range of cost savings they could achieve from using the Openwave data compression  
 12 products. *See* Heptig Decl., ¶16, Ex. 12 (webpage from Openwave website regarding “ROI”  
 13 modeling calculator). Realtime previously agreed to limit this request to documents regarding  
 14 any “ROI” analyses relating to Sprint’s purchase or use of Openwave data compression products  
 15 in Sprint’s data network. *Id.*, at Ex. 7 at p. 4. Openwave’s objections to the document request are  
 16 without merit and should be overruled, and Openwave should be ordered to produce the  
 17 requested documents at the earliest possible date.

18           **H. Request for Production No. 8:** “All Documents relating to any data traffic  
 19 reduction analysis for any of your Compression Server products or services that you have  
 20 performed, participated in, or received, including any data traffic reduction study, model, testing  
 21 or trial.”

22           1. Openwave objects that the phrase “data traffic reduction analysis” is vague and  
 23 ambiguous. It is not vague or ambiguous. It is clear and concise, and constitutes a well-known  
 24 concept used in the communications industry related to data streaming. Openwave is a company  
 25 that develops and sells data compression products to telecommunication companies, such as  
 26 Sprint. The primary purpose of the Openwave data compression products is to reduce the amount  
 27 of data traffic in the telecommunication network.

1           2. Openwave next objects that the request is overly broad and unduly burdensome  
2 and that it is not reasonably calculated to lead to the discovery of admissible evidence. The  
3 request is neither overly broad nor unduly burdensome. The requested documents will contain  
4 information about the effectiveness and operational capabilities of the Openwave data  
5 compression products used in the accused Sprint data network. This information is directly  
6 relevant to the underlying patent infringement and damages suffered by Realtime as a result of  
7 Sprint's use of the Openwave data compression products. At a minimum, this information is  
8 reasonably calculated to lead to the discovery of such admissible evidence. Openwave's  
9 objections are without merit and should be overruled, and Openwave should be ordered to  
10 produce the requested documents at the earliest possible date.

11           **I. Request for Production No. 9:** "All Documents relating to any cost of ownership  
12 savings analysis for any of your Compression Server products or services that you have  
13 performed, participated in, or received, including any data traffic reduction study, modeling,  
14 testing or trial."

15           Openwave objects that the phrase "cost of ownership savings analysis" is vague and  
16 ambiguous. It is not vague or ambiguous. It is clear and concise and constitutes a well-known  
17 and easily understood term. A "cost of ownership savings analysis" is similar to a "return on  
18 investment analysis" or "ROI." For the same reasons as set forth above for "ROI" documents,  
19 Openwave's objections to this request are also without merit. Indeed, Openwave advertises its  
20 own "ROI" analysis tool on its website for potential customers to use to calculate its projected  
21 costs savings and its "return on investment" of the capital cost to purchase the data compression  
22 products. These "cost of ownership saving analysis" and related documents contain relevant and  
23 material information showing Sprint's projected cost savings, cost expenditures, network data  
24 traffic reduction, and "return on investment" that Sprint has achieved or expects to achieve from  
25 utilizing the Openwave data compression products. These documents are relevant to Realtime's  
26 damages claims for Sprint's infringement of Realtime's patents. Openwave's objections should  
27 be overruled, and Openwave should be ordered to produce the requested documents at the  
28 earliest possible date.

**V. Openwave's Objections to the Deposition Subpoena Should be Overruled**

Openwave's objections to the Deposition Subpoena are virtually identical to its objections to Realtime's document production subpoena. For all of the reasons set forth above regarding that Document Subpoena, Openwave's objections to the deposition subpoena should be overruled. Any different objections raised by Openwave to the Deposition Subpoena are addressed below.

**A. Openwave's Objections to Realtime's "Definitions" Should be Overruled**

**Objection to "Operational Outputs":** Openwave objects to the definition of "Operational Outputs" as "unintelligible" to the extent the descriptive terms are undefined and ambiguous. Openwave further objects to the extent that the definition includes "any documents" based upon "Operational Outputs" and to the extent that the definition relies on the terms "Compression Server" and "Communication" to which Openwave earlier objected. The objections are without merit. The definition of "Operational Outputs" is set out in clear and concise language:

"any files, DOCUMENTS, and/or COMMUNICATIONS that are generated by the operation of any COMPRESSION SERVER, including logs, profiles, key performance indicators (KPIs), throughput reports, cache statistics, ITF-N XML flat files that capture raw counters related to optimization, as well as any DOCUMENTS based on such files, DOCUMENTS, and/or COMMUNICATIONS."

The definition specifies different types and examples of "Operational Output" files, including "log files" and transaction reports that are created by the Openwave data compression products that record information about each data compression operation performed by the Openwave compression products, along with other key performance information (or "KPI") regarding the overall performance and effectiveness of the compression products. The inclusion of "Documents based on such files" in the definition refers to any summary reports or transaction aggregation reports of these data compression transaction log files. Openwave fails to identify any specific terms in this definition that render it unclear or ambiguous. Nor does Openwave



1 assert that its personnel would not understand what is meant by this definition. Openwave's  
2 objection should be overruled.

3 **Objection to "Configuration Files":** Openwave objects to the term "Configuration  
4 Files" as overly broad and unduly burdensome and to the extent that the definition relies on the  
5 term "Compression Server." The objections are without merit. The term "Compression Server" is  
6 clearly and adequately defined:

7 "any DOCUMENTS used by or intended for use with a COMPRESSION SERVER to  
8 control or configure the operation of that COMPRESSION SERVER."

9 As set out in the definition, "configuration files" are the files and information used to control and  
10 configure the operation of the Openwave data compression products. Those data compression  
11 products perform complex operations to compress different types of data transmitted through a  
12 wireless data network (such as the accused Sprint wireless data network) to an end user (such as  
13 a Sprint cell phone subscriber). These data compression systems require system initialization  
14 and operation parameters from the network provider (like Sprint) in order to perform the data  
15 compression functions required by the specific network provider. The definition of  
16 "Configuration Files" is clear, direct and concise, and it is easily understood. Openwave's  
17 objections should be overruled.

18 **B. Openwave's Objections to the Deposition Topics Should be Overruled**

19 **1. Deposition Topic No. 1:** "The design, installation, testing, operation,  
20 administration, use, features, and functionality of each Compression Server  
21 provided to or used by any Defendant, including which features and functionality  
22 are used by each Defendant and all Communications with any Defendant."

23 This deposition topic is straightforward. It seeks information regarding the various  
24 Openwave data compression products utilized by Sprint (or any other Defendant) in the accused  
25 data networks during the past several years (from 2004 to the present). Openwave is a key  
26 source for this information, which is material and relevant to Realtime's infringement claims in  
27 the Lawsuit. Openwave objects that Realtime has received or can obtain the requested  
28 information from Sprint or other Defendants in the Lawsuit. There is no guarantee or assurance,

1 however, that Realtime will be able to obtain all of this information from Sprint (or other  
2 Defendants) in the Lawsuit. Indeed, contrary to Openwave's inference, it is unlikely that Sprint  
3 has full knowledge of all of the various Openwave data compression systems (including different  
4 product types and versions of those products) that have been deployed and used by Sprint over  
5 the past several years. An example of this is employee turnover at Sprint, faded memories, and  
6 lost documents. Realtime is entitled to obtain this information from Openwave, who is in a better  
7 position to know the features and functionality of each data compression product, as well as the  
8 differences between the operations of those products. This is key in this case because the  
9 manner in which certain types of data compression operations are performed is relevant to  
10 Realtime's asserted patent claims.

11 Openwave does not assert that the requested information is not relevant or material to the  
12 issues in the Lawsuit. Indeed, it is clear that the requested information is of great relevance and  
13 materiality to those issues. Openwave's objections to the requested topic should be overruled,  
14 and Openwave should be ordered to testify about that information at its deposition.

15 **2. Deposition Topic No. 2:** "Any contracts or agreements for each Compression  
16 Server provided to or used by and Defendant, including all facts and  
17 circumstances related to indemnification demands or requests made to You by  
18 and Defendant relating to the Lawsuit and/or any Compression Server."

19 Openwave objects that the topic is overly broad and unduly burdensome. The topic is  
20 neither. Openwave has only set forth its conclusions about the requested information. It has  
21 failed to state even one fact or reason to support its conclusion. Openwave next objects that the  
22 topic seeks privileged information. This is no reason to preclude a deposition. Realtime is  
23 entitled to obtain information about Openwave's contracts with any Defendant and any  
24 indemnification demands relating to the Lawsuit. To the extent a question seeks privileged  
25 information, Openwave can raise a privilege objection during the deposition. Openwave's  
26 objections should be overruled.



1           **3. Deposition Topic No. 3:** “The Source Code for each Compression Server  
2           provided to or used by any Defendant, including which Source Code was  
3           provided to and/or used by which Defendant.”

4           Openwave objects that Realtime has received or can obtain the requested information  
5           from the Defendants in the Lawsuit. To the contrary, neither Sprint nor any other Defendant has  
6           the source code for the Openwave data compression products. The information sought is  
7           Openwave’s information. Openwave is the only party who can know all of the information  
8           related to its products. If Sprint (or any other Defendant) did obtain some of the requested  
9           information from Openwave and did produce such information, Realtime cannot know if all  
10          relevant information to Openwave’s products and services was provided to or produced by  
11          Sprint. The only source for the requested information is Openwave. Openwave’s objections  
12          should be overruled.

13           **4. Deposition Topic No. 4:** “All facts and circumstances, including dates of use,  
14           related to all Operational Outputs and Configuration Files of any Compression  
15           Server provided to or used by any Defendant.”

16          Openwave objects that the terms “operational outputs” and “configuration files” are  
17          vague, ambiguous and unintelligible. To the contrary, as explained above, the definitions for  
18          those terms are clear and easily understood. Openwave next objects that Realtime has received  
19          or can obtain the requested information from the Defendants in the Lawsuit. This deposition  
20          topic seeks testimony on the logs, reports, and other “operational outputs” generated by the  
21          Openwave data compression product used Sprint. It also seeks testimony on the “configuration  
22          files” Openwave provided to Sprint for its data compression products. Openwave is the only  
23          party who can know all of this information related to its products. If Sprint (or any other  
24          Defendant) did produce such information, Realtime cannot know if all of the relevant  
25          information to Openwave’s products was either provided to Sprint or otherwise produced by  
26          Sprint. The only source for all of the requested information is Openwave.

27          Openwave does not assert that the requested information is not relevant or material to the  
28          issues in the Lawsuit. Indeed, the requested information is highly relevant to the detailed

operation and functionality of the data compression systems used by Sprint in its accused network. Openwave's objections should be overruled.

**5. Deposition Topic No. 5:** "The current historical sales (from 2004 to the present) to any Defendant of any Compression Server."

Openwave objects to the request as vague and ambiguous. It is neither. It is a simple, straightforward topic for deposition – the sales of Openwave's data compression products to any Defendant in the Lawsuit. Openwave does not assert that the requested information is not relevant or material to the issues in the Lawsuit. Indeed, this topic is relevant to the issue of infringement (such as when certain data compression products were purchased and deployed by Sprint in its network) and damages (such as the amounts Sprint paid for the data compression technology utilized in its network). Openwave's objections should be overruled.

**6. Deposition Topic No. 6:** "The value, pricing, benefits, advantages, and/or disadvantages of each Compression Server provided to or used by any Defendant, including all facts and circumstances related to any return-on-investment (ROI), data traffic reduction, cost of ownership, and/or savings analysis, study, or testing."

Openwave objects that the topic is overly broad and unduly burdensome. As explained above in connection with Openwave's objections to document production Request Nos. 6-9, *see* Sections IV.F-I, *supra.*, this topic seeks testimony regarding any return-on-investment (ROI), data traffic reduction, cost of ownership or cost savings analyses that Openwave performed or was involved in with regard to any Openwave data compression products utilized by Sprint (or any other Defendant). The topic is neither overly broad nor unduly burdensome. Openwave has only set forth its conclusions about the requested information. It has failed to state even one fact or reason to support its conclusions. The topic is directly related to the patent infringement claims in the Lawsuit, including infringement of the patent claims and damages suffered by Realtime based upon Sprint's use of the Openwave data compression technology in the accused data network. At a minimum, the information could lead to the discovery of admissible evidence on these issues. Openwave's objections should be overruled.

1           **7. Deposition Topic No. 7:** “All Communications between You and any person,  
2           including but not limited to any Defendant, relating to Realtime Data LLC, the  
3           Realtime Patents, and/or the Lawsuit.”

4           Openwave objects that the topic is overly broad and unduly burdensome and not  
5           reasonably calculated to lead to admissible evidence. The topic is neither overly broad nor  
6           unduly burdensome. Openwave has only set forth its conclusions about the requested  
7           information. It has failed to state even one fact or reason to support its conclusions. The topic is  
8           directly related to the issues in the Lawsuit. It goes to communications between Openwave and  
9           any person relating to Realtime, Realtime’s patents, or the Lawsuit. Such communications could  
10          contain information about (i) knowledge of Realtime and its patents prior to the development or  
11          sale of any data compression products to Sprint or other Defendants, (ii) discussions about  
12          potential infringement of the Realtime patents, and (iii) discussions about the lack of non-  
13          infringing alternatives to Realtime’s inventions. This information is relevant to the issues of  
14          patent validity, willful infringement, and damages in the Lawsuit. At a minimum, the  
15          information could lead to the discovery of admissible evidence on these issues.

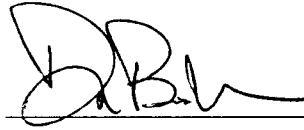
16          In view of the foregoing, Openwave’s objections to the deposition topics should be  
17          overruled and Openwave should be ordered to produce a witness to testify on the topics.

#### 18          **VI. Conclusion**

19          For the foregoing reasons, Realtime respectfully requests that the Court grant this Motion  
20          to Compel Openwave to produce the documents and testimony required under the subpoenas.  
21          The documents and testimony requested by Realtime from Openwave are relevant and necessary  
22          to the issues in the Lawsuit. Realtime has a fact discovery cutoff date of June 15, 2012 in the  
23          Lawsuit. Time is of the essence. Openwave’s objections should be overruled and Openwave  
24          should be ordered to produce the requested documents and testimony at the earliest possible date  
25          and prior to June 15, 2012. Pursuant to Fed. R. Civ. P. 37(a)(5), Realtime requests that the Court  
26          order Openwave to reimburse Realtime for its attorneys’ fees and costs incurred in connection  
27          with this Motion, and any other relief that the Court and equity may require.

1 Dated: April 20, 2012

Respectfully submitted,

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3

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**PROOF OF SERVICE**

I am employed in the County of Santa Clara, State of California. I am over the age of 18 and not a party to the within action. My business address is at 60 South Market Street, Ste. 1400, San Jose, CA 95113.

On April 20, 2012, I served the foregoing document described as REALTIME DATA LLC'S MOTION TO COMPEL DOCUMENT PRODUCTION AND TESTIMONY FROM OPENWAVE SYSTEMS, INC. on each interested party, as follows:

**Brett Schuman**  
**Morgan Lewis & Bockius, LLP**  
**One Market, Spear Street Tower**  
**San Francisco, CA 94105-1126**

**bschuman@morganlewis.com**

☒ (BY U.S. MAIL) I caused the foregoing document to be served by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the U.S. Mail in San Jose, California, and addressed to the parties listed above.

☒ (BY ELECTRONIC MAIL) I caused the foregoing document to be served electronically by electronically mailing a true and correct copy through Confluence Law Partners electronic mail system to the e-mail address(es), as set forth above, and the transmission was reported as complete and no error was reported.

Executed on April 20, 2012, at San Jose, California.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

\_\_\_\_\_  
 Janet Ho  
 (Type or print name)

\_\_\_\_\_  
*Janet Ho*  
 (Signature)